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Nos. 62 and 73

In the Supreme Court of the United States

OCTOBER TERM, 1959

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, APPELLANT

v.

UNITED STATES OF AMERICA

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v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

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1. Throughout its brief the Association emphasizes that the Capper-Volstead Act looks to the achievement by agricultural cooperatives of market-wide domination and power and that this statutory objective is the antithesis of that of the Sherman Act. It contends (Br. 23) that application of the "conventional standards [of the Sherman Act] to farmer coopera-

tives would plainly subject them to criminal antitrust prosecutions for achieving or seeking the very market power which Capper-Volstead authorizes them to have and federal agencies have actively encouraged them to acquire." It accordingly concludes (Br. 72) that, as to these cooperatives, Capper-Volstead "immunized monopolization or restraint of trade unless prices were unduly enhanced."[1]

The primary issue in this case is, however, much narrower and more precise than that stated by the Association. The Government has not asserted that a cooperative, by the mere possession of monopoly market power, transcends any Capper-Volstead authorization. It does not assert the invalidity of market power achieved by voluntary enlistment of the area farmers in a program of collective marketing through the medium of a Capper-Volstead association. Its contention is that the Act itself defines what it authorizes—collective marketing through membership associations and such agreements and contracts as are "necessary" to attain this end. It further contends that the statutory authorization does not extend to cutting off access to the market by competing cooperatives or non-member producers, or to denying such access by boycotting, coercing or discriminating against those who deal with non-member producers. While we recognize that Capper-Volstead authorizes vertical integration through acquisition by a cooperative of a dealer for the purpose of marketing the prod-

[1] Save in the single circumstance where such cooperatives conspire or combine with non-agricultural producers, which this Court held to be non-exempt in the *Borden* case.

uce of its members direct to retailers, the Government maintains that the authorization does not embrace vertical integration having as its purpose, as found by the district court, exclusion of competitors (non-member producers) from the market.

Thus, in our view, the critical question in this case turns, not on some vague general objective of the Capper-Volstead Act, but on whether the conduct charged against the Association or found by the district court is beyond the ambit of § 1 of that Act.

The Capper-Volstead Act does not speak in terms of market control or price control as such. What it does is to permit certain marketing machinery which, if utilized, may bring about a considerable measure of price or market control. But because the Act envisages and permits this kind or degree of control, it does not follow that it permits control achieved by other means. Indeed, a statute which does not in express terms grant any antitrust immunity, as do numerous federal statutes, is hardly to be deemed to grant, purely by implication, the wholesale immunization from the antitrust laws suggested and urged by the Association.

Existing authorities are, we submit, unanimously against the Association's contention that the Capper-Volstead Act immunizes, as to cooperatives, monopolization or unreasonable restraint of trade irrespective of the means (other than agreement with outsiders) employed to monopolize or restrain. See discussion of the *Borden* case and lower court decisions in our main brief (pp. 21–22, 25–27, 33–34). See also Mischler, *Agricultural Cooperative Law*, 30 Rocky

Mountain L.R. 381, 395 (1958); Hulbert, *Legal Phases of Farmer Cooperatives,* Farmer Cooperative Service Bulletin 10, U.S.D.A. (1958) 166–169; Note, 44 Va. L.R. 63 (1958); comment, 107 U. Pa. L.R. 1222 (1959); 57 Mich. L.R. 921 (1959); 73 Harv. L.R. 418 (1959).

2. The Association, in support of its contention that all practices of agricultural cooperatives (except agreements with outsiders) are exempt from the Sherman Act, relies heavily on the debates on H.R. 13931 (66th Cong.) and H.R. 2373 (67th Cong.), the latter of which became the Capper-Volstead Act.[2] But these debates dealt primarily with whether an association should be permitted to obtain a monopoly by gaining control of the entire source of supply in a particular area (see our main brief, pp. 22–25), and not with whether an association could engage in predatory and coercive practices in obtaining such control. Indeed, during the Senate debate it was recognized that members of agricultural cooperatives do not engage in predatory conduct. Thus, Senator Walsh, chairman of the Committee that reported the bill, in speaking of "the milk producers in the State of Virginia and in the State of Maryland," stated that "[t]hey do not resort to any unfair practices at all. They simply organize themselves, and they all unite in one associa-

[2] Excerpts from these debates, which cover over 150 pages of the Congressional Record (59 Cong. Rec. 7851–58, 8016–18, 8021–29, 8031–40; 60 Cong. Rec. 312–318, 360–377; 61 Cong. Rec. 1033–45; 62 Cong. Rec. 2048–54, 2057–61, 2107–23, 2156–74, 2216–30, 2256–81, 2453–54), are set forth in the Appendix to the Association's brief (10a–17a, 18a–20a, 21a–25a, 28a–48a).

tion under the protection of this act; they set up their own distributing system in the city of Washington * * * the association does not resort to unfair practices at all * * *" (62 Cong. Rec. 2164).[3]

Thus, the general statements in the debates upon which the Association relies, that cooperatives which monopolize will be subject only to being proceeded against by the Secretary of Agriculture if they unduly enhance prices, cannot fairly be read as showing a Congressional intent to bar the United States from proceeding directly under the Sherman and Clayton Acts against monopolization (and other antitrust violations) achieved through, or which involve, predatory and coercive conduct directed against non-member competitors. To the contrary, read in the light of the problem that then concerned Congress—whether associations should be barred from monopolizing in the sense of obtaining control of the entire source of supply in a particular market—they meant at most that that kind of "monopoly" was not to be proceeded against directly under the Sherman or Clayton Acts but solely by the Secretary of Agriculture. But with respect to the different problem presented in the instant case—predatory and coercive conduct by the Association—the House Committee report on H.R. 2373 (67th Cong.) makes it clear, we believe, that the Capper-Volstead Act was not intended to preclude a direct antitrust suit by the United States. For that

[3] Similarly, Senator Walsh pointed out (*ibid.*) that "the Raisin Growers' Association out in the State of California * * * are not accused of having done anything wrong to drive their competitors out of business * * *."

report explicity states that if associations authorized by the bill "do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law" (see our main brief, p. 24). "[T]he penalties imposed by that [Sherman] law" plainly are not the same thing as a cease-and-desist order issued by the Secretary of Agriculture.

Two circumstances give added significance to the above authoritative statement. One is that in the 67th Congress the report of the House Committee repeated verbatim the paragraphs of the Committee's report on the bill in the preceding Congress, but added certain paragraphs, including the one which stated that if the authorized associations violated the Sherman Act they would be subject to the penalties "imposed by that law".

The other significant circumstance is that § 1 of the bill as reported by the House Committee in the 66th Congress provided that agricultural producers may act together in membership associations in collectively marketing their products, and may organize and operate such associations and "make the necessary contracts and agreements to effect that purpose, *any law to the contrary notwithstanding*: * * *" (59 Cong. Rec. 7851); but that the italicized words were omitted from the bill reported by the Committee in the 67th Congress (61 Cong. Rec. 1033). This deletion was made after opponents of the bill had protested, in the 66th Congress, that the "any law to the contrary notwithstanding" phrase would give the associations complete exemption from the antitrust laws (see, for example, the remarks of Representative Igoe (59

Cong. Rec. 8031, 8038–39)). Despite the assurance given by proponents that the phrase was inserted in order to insure that the mere forming of a cooperative through which farmers could market their products would not be held to be a violation of the law, opponents had insisted that the purpose of the phrase was to place cooperatives beyond the reach of the antitrust laws (60 Cong. Rec. 316–18). The deletion therefore dovetails with the insertion of the paragraph as to Sherman Act liability in the Committee report in the 67th Congress.

Moreover, when this Court held in *United States* v. *Borden Co.*, 308 U.S. 188, 206, that "the procedure under § 2 of the Capper-Volstead Act * * * is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under § 1 of the Sherman Act," it did so after full development of the argument (with extensive citations to legislative history and Congressional debates) that Congress, in enacting the Capper-Volstead Act, intended to withdraw combinations, contracts and agreements of agricultural producers from the purview of the Sherman Act.[4] Thus, in the instant case the Association, in contending that § 2 of Capper-Volstead provides the exclusive method for dealing with antitrust violations (not involving conspiracy with outsiders) by cooperatives, is asking this Court to adopt an interpretation of that Act which had been squarely presented in *Borden* and unanimously rejected.

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[4] See the briefs in *Borden* of The Borden Company (pp. 9–21, Appendix C, pp. 69–90) and of Pure Milk Association (pp. 51–66).

3. The specific statements in the debates upon which the Association relies are subject to further infirmities. A number of them involve interpretations of the Act which this Court rejected in *Borden*. Thus, although the Association emphasizes (Br. 59) Congressman Volstead's statement that "in the event that there is a complaint against them [cooperatives] they will not be subject to criminal prosecution," this Court in *Borden* upheld an indictment of a cooperative. It pointed out (308 U.S. 206) that "[t]he Sherman Act authorizes criminal prosecutions and penalties," and that a proceeding by the Secretary of Agriculture under § 2 of Capper-Volstead "is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under § 1 of the Sherman Act for the purpose of punishing such conspiracies." Similarly, the views of Congressman Sumners and Senator Kellogg that the Secretary of Agriculture was to have primary jurisdiction in proceedings against cooperatives (Br. 61–62) are directly contrary to this Court's holding in *Borden* (*ibid.*) that since § 2 of Capper-Volstead "contains no provision giving immunity from the Sherman Act in the absence of a proceeding by the Secretary," the Act does not give the latter primary jurisdiction with respect to violation of the Sherman Act by agricultural cooperatives.

Senator Borah's statement (Br 57) that the proposed bill "deprives the court, in the first instance, of examining into the question of whether or not they [cooperatives] have violated the law * * * and provide[s] another tribunal before which they can have

their hearings," was not made during the 67th Congress which passed the Act, but during the preceding Congress which had before it a bill in significantly different form. For the bill in the 66th Congress authorized cooperatives to perform certain functions, "any law to the contrary notwithstanding"; the quoted words were omitted from the bill reported by the House Committee in the 67th Congress after opponents of the bill had protested in the earlier Congress that this phrase would give the associations complete antitrust immunity (see, *supra,* pp. 6–7). Furthermore, Senator Borah's comments were made in opposition to the bill, and as such cannot be deemed to reflect the intention of the Congress. Opponents of a measure naturally tend to exaggerate its allegedly dire consequences in attempting to defeat it. Finally, the full text of the colloquy between Senator Borah and Senator Sterling (60 Cong. Rec. 315–316), during which the statement relied upon was made, indicates that the subject under discussion was the necessity for making explicit that agricultural cooperatives were not, in themselves, combinations in restraint of trade. We repeat that neither this history, nor the other material upon which the Association relies, contains any indication that Congress intended to confer a Sherman Act exemption upon agricultural cooperatives for the kind of predatory and coercive practices here involved.

4. We deem irrelevant the following points made by the Association (Br. 48–52): that Congress chose to provide for administrative enforcement of § 2 of Capper-Volstead by the Secretary of Agriculture

rather than the Federal Trade Commission; that the § 2 procedure is partially patterned on the enforcement procedures of §§ 11 and 15 of the Clayton Act; and that, unless § 2 gives antitrust immunity, an agricultural cooperative "becomes liable to a triple enforcement scheme". Since § 2 of Capper-Volstead is merely a limitation on rights conferred by § 1 of the Act, the choice made by Congress as to the procedure appropriate for enforcement of § 2 has, we submit, no bearing upon the issue presently pertinent as to § 2, namely, whether it impliedly immunizes from the antitrust laws conduct not within the authorization of § 1 of the Act. And since § 2 does not provide for or relate to enforcement of the antitrust laws, it is not an additional or "triple" method of enforcement. So far as the antitrust laws are concerned, § 2 merely provides the procedure for enforcing a limitation on such *exemption* from these laws as results from the legalization, by § 1 of Capper-Volstead, of the conduct there authorized.

Respectfully submitted.

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